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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VALERIE LEWIS, Plaintiff, v. CITY NATIONAL CORPORATION et al., Defendants.	CASE NO. CV-12-4269 GHK(AJWx) PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL ARBITRATION AND TO DISMISS DATE: September 10, 2012 TIME: 9:30 a.m. CTRM: 650 JUDGE: Hon. George H. King

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1. Introduction and Summary. Defendant's motion seeks to compel arbitration of plaintiff's first and third claims, and to dismiss under 12(b)(6) plaintiff's second cause of action for whistleblowing/Dodd Frank. Defendant's motion fails, because:

(a) The pre-dispute arbitration agreement is not valid or enforceable under the Dodd-Frank Act amendments of 2010; and

(b) The second cause of action is viable, because defendant's conduct occurred after the effective date of the relevant statute(s).

Accordingly, defendant's motion should be denied.

2. Facts.

a. Allegations of the complaint. Plaintiff worked for defendants as a Chief Compliance Officer for nearly six years, performing her job in an exemplary manner. Complaint, ¶¶4-6. During her employment, plaintiff encountered increasing resistance and hostility from defendants to her reporting of defendants' multiple violations; and faced a series of increasingly retaliatory responses. Complaint, ¶¶7-10. On or about May 19, 2011, after nearly six years of distinguished service, plaintiff's employment was involuntarily terminated, in retaliation for her whistleblowing regarding defendants' improper conduct. Complaint, ¶11.

b. Summary of claims. Plaintiff brings three claims based on whistleblowing/retaliation, as follows:

(1) First Cause of Action for Violation of the Sarbanes-Oxley Act ("SOX"). Complaint, ¶¶14-18.

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(2) Second Cause of Action for Violation of the Dodd-Frank Act. Complaint, ¶¶19-23.

(3) Third Cause of Action for Wrongful Termination in Violation of Public Policy. Complaint, ¶¶24-26.

3. Argument: Defendant's Motion should be denied.

Defendant's motion seeks to compel arbitration of plaintiff's first and third claims, and to dismiss under 12(b)(6) plaintiff's second cause of action for whistleblowing/Dodd Frank.[1] Both arguments fail:

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[1] Defendant apparently does not seek to compel arbitration of the second cause of action, and, to the contrary, expressly seeks this Court's substantive determination of (fn. 1 - cont.) that claim. Defendant's Brief, pp. 10-11. This is a concession by defendant that the Dodd-Frank claim is not subject to arbitration, as recognized by defendant in meet and confer, and as stated in defendant's own authority. See Ex. B to Harn decl., p. 2 ("As commentary in the Holmes case suggests, arbitration of Ms. Lewis' specific Dodd Frank claim (12 U.S.C. § 5567) is not required"); see Holmes v. Air Liquide USA LLC, 2012 U.S. Dist. LEXIS 10678, 12-13 (S.D. Tex. 2012) ("The Court emphasizes that this is not a case in which the dispute arises under Dodd-Frank — it is clear that any agreement requiring the arbitration of such a dispute would be invalid"). See generally, 12 U.S.C. § 5567(d)(2) ("Except as provided under paragraph (3), and notwithstanding any other provision of law, no predispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section.")

Moreover, even if the second claim were arguably covered by arbitration -- which defendant concedes it was not -- defendant has waived such argument by seeking adjudication of that claim by this Court, rather than in arbitration. See, e.g., Cox v. Ocean View Hotel Corp., 533 F.3d 1114, 1124 (9th Cir. 2008) (party's actions inconsistent with the right to arbitrate are a factor in determining waiver).

a. Defendant's Motion to Compel Arbitration should be denied.

(1) The pre-dispute arbitration agreement is not "valid or enforceable" under the 2010 Dodd-Frank/SOX amendments. On July 15, 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act. P.L. 111-203 ("Dodd-Frank" or the "Act"). In several sections, the Act established that certain predispute arbitration agreements are neither valid nor enforceable. See, e.g., 18 U.S.C. § 1514A(e)(2) (enhancing scope of the Sarbanes-Oxley whistle-blower provisions) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.") and 18 U.S.C. § 1514A(e)(1) (providing that "The rights and remedies provided for in this section [which includes the right to a jury trial under 18 U.S.C. § 1514A(b)(2)(E)] may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.")[2]

Here, defendant's proffered arbitration agreement purports require arbitration of "claims for violation of any federal, state or local law, ordinance, regulation or rule." See Ex. A, p. 1, ¶2.1, to Kilroy decl. (attached to Deft's Moving Papers).

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[2] See also 7 U.S.C. § 26(n)(2) (adding new protections under the Commodity Exchange Act) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."); see also 12 U.S.C. § 5567(d)(2) ("Except as provided under paragraph (3), and notwithstanding any other provision of law, no predispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section.").

Thus, by its terms, the purported arbitration agreement is a predispute arbitration agreement covered, inter alia, by 8 U.S.C. § 1514A(e)(1) and (2).

Defendant nevertheless argues that the predispute arbitration agreement is valid and enforceable -- notwithstanding the Dodd-Frank amendments, above -- because the 2010 law purportedly does not apply to any predispute agreements entered into prior to the law's enactment, because it is not "retroactive." Deft's Brief, pp. 9-10. As set forth below, this argument fails, and defendant's motion should be denied.

(a) Plain language.[3] The Supreme Court's seminal case on retroactivity is Landgraf v. Usi Film Products, 511 U.S. 244 (1994), which establishes a two-part approach to determining if a new statute has an impermissible retroactive effect. The first task "is to determine whether Congress has expressly prescribed the statute's proper reach." Id. at 280. If Congress has done so there is no need to inquire further. Id.

Here, the statutory language is unambiguous; it is plain, clear and broad, e.g.:

- "**No** predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." See 18 U.S.C. § 1514A(e)(2) (emphasis added); and

[3] Because of the recent enactment of Dodd-Frank, the issues presented on this motion are of first impression, and that there is no known Ninth Circuit or Supreme Court cases addressing the specific legal issues here. Plaintiff also recognizes that the position advocated in this section (a) is not supported by district court decisions discussed below; which have found the language to be ambiguous. Plaintiff respectfully disagrees with that analysis for the reasons set forth herein.

- "The rights and remedies provided for in this section [which includes the right to a jury trial under 18 U.S.C. § 1514A(b)(2)(E)] may **not be waived** by **any** agreement, policy form, or condition of employment, including by a predispute arbitration agreement." 18 U.S.C. § 1514A(e)(1)(emphasis added).

Notably, this language broadly applies to any and all "predispute arbitration agreement[s]", not limited by time.[4] There is no expression of exemption for pre-existing agreements, or limitation to future agreements only. The plain language of the statute shows that it intended to apply to all pre-dispute arbitration agreements pertaining to the subject matters covered -- not just future agreements.[5]

Defendant's argument -- that the Act intends to exempt all preexisting agreements -- is contrary to these express terms, and lacks any support in the text, legislative history or common sense. Thus, under Landgraf, supra, Congress' clear language and intent should be respected, the 2005 predispute agreement at issue here is subject to the express terms of the 2010 Act, and defendant's motion should be denied.

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[4] Indeed, defendant conceded in meet and confer that the plain language of the statute appeared to preclude arbitration of plaintiff's first claim. Ex. B , p. 1 to Harn decl. (attached to Deft's Moving Papers) ("As to Ms. Lewis' claim under 18 U.S.C. §1514A, I recognize that the current language in subsection (e) of that code section would seem to bar enforcement of a pre-dispute agreement to arbitrate such claims").

[5] Of course, Congress was aware of existing predispute arbitration agreements when it enacted Dodd-Frank -- indeed, these were the only agreements before Congress when it enacted the law, and the very reason for such restrictions were enacted!

(b) Procedural remedy. Even assuming, arguendo, the express language of the Act was ambiguous as to past predispute agreements (which it is not), "retroactive" application is nevertheless appropriate under Landgraf, because the Act -- which does no more than select the tribunal in which plaintiff's claim will be heard and has no effect whatsoever on defendant's substantive rights -- is procedural in nature and therefore clearly covers pre-existing agreements.

Under Landgraf, where a statute effects a procedural, rather than a substantive change, there is no bar to retroactivity. Landgraf, supra, 511 U.S. at 270, 274. "Application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" Id. at 274. Notably, Landgraf held that a provision guaranteeing a jury right would be procedural, not substantive, in nature. Id. at 280.

Pezza v. Investors Capital Corp., 767 F. Supp.2d 225 (D. Mass. 2011) applied the Landgraf test to the Dodd-Frank amendment at issue here, and concluded, after extensive analysis of the statutory scheme, that the requiring of a jury, rather than arbitral forum, was procedural in nature, and thus was applicable to agreements prior to the enactment of Dodd-Frank. Pezza 767 F. Supp. 2d at 232-234.

Specifically, the Pezza court found that the Supreme Court had previously (and on multiple occasions), held that arbitration and court provide different procedural tribunals, but there is no substantive difference:

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> "As the Supreme Court held, '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'"

Pezza v. Investors Capital Corp., 767 F. Supp. 2d 225, 233-234 (D. Mass. 2011) (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985); Rodriquez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 486 (1989); Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 205-06 (2d Cir. 1999); St. Paul Fire & Marine Ins. Co. v. Employers Reinsurance Corp., 919 F. Supp. 133, 139 (S.D.N.Y. 1996); Pitter v. Prudential Life Ins. Co. of Am., 906 F. Supp. 130, 134 (E.D.N.Y. 1995)).

Here, as in Pezza, defendant has not made any showing of any substantive prejudice in trying this case in court rather than in arbitration. Pezza, 767 F. Supp.2d at 234.[6]

In contrast, the two district court cases cited by defendant on this issue have little, if any, persuasive value. Henderson v. Masco Framing Corp., 2011 U.S. Dist. LEXIS 80494, 2011 WL 3022535 (D. Nev. 2011), involved a situation where plaintiff sought to invoke arbitration, and defendant opposed it, claiming the agreement was voided by Dodd-Frank. The Henderson court ruled for plaintiff; it considered Pezza and rejected it, deciding without discussion or analysis that a

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[6] Indeed, if anything, the arbitral forum is likely to be more costly to defendant, and, given the additional time needed to initiate a claim, select a neutral, conduct full discovery, etc., likely more time consuming than remaining in court.

contractual agreement to litigate in arbitration was "substantive" (while a statutory right to litigate in court is not under Supreme Court precedent). Likewise, Holmes v. Air Liquide USA LLC, 2012 U.S. Dist. LEXIS 10678, 2012 WL 267194 (S.D. Tex. 2012) offers no persuasive analysis. That case, unlike the instant case, did not involve a SOX or Dodd-Frank claim. Holmes simply adopted Henderson's conclusion; and, like Henderson, offered no explanation or analysis as to why or how defendant having a court trial rather than an arbitration constituted a substantive prejudice to defendant.

Accordingly, as set forth in Landgraf, and applied in Pezza, the Dodd-Frank ban on arbitration has procedural, rather than substantive effect, and there is no bar to applying the statute according to its terms. Thus, the purported predisputed arbitration agreement at issue here is not valid or effective, and defendant's motion to compel arbitration should be denied.

b. Defendant's motion to dismiss should be denied. Defendant contends plaintiff's Dodd-Frank retaliation claim (second claim) is not viable, contending that the Dodd-Frank effective date for Section 1057 of the Dodd-Frank Act (12 U.S.C. § 5567) is July 21, 2011, which is after plaintiff's termination date of May 19, 2012. This argument fails.

First, under Section 4 of the Dodd-Frank Act, the general effective date is July 22, 2010 (the day after enactment). See 12 U.S.C. §5301 ("Except as otherwise specifically provided in this Act or the amendments made by this Act, this Act and such amendments shall take effect 1 day after the date of enactment of this Act"). Specifically, this effective date applies to

claims under Section 922 -- both Section 922(c), amending Sarbannes-Oxley claims (first cause of action, see 18 USC § 1514A); and Section 922(a), creating whistleblower claims under 15 USCS § 78u-6(h). Specifically, 15 USCS § 78u-6(h)(1)(A)(iii) provides: "No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower. . . in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.) . . . and any other law, rule, or regulation subject to the jurisdiction of the Commission." Thus, plaintiff's claim under this section includes any conduct after July, 2010.[7]

Second, it appears that at least some of defendant's retaliatory conduct post-dated plaintiff's termination, including interfering with plaintiff's attempts to secure subsequent employment. Thus, even with respect to the Dodd-Frank whistleblower provision with a July 21, 2011 effective date (12 U.S.C. § 5567), plaintiff's claim is viable.[8]

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[7] Plaintiff contends that the complaint should be broadly construed, and notes that defendant did not move for a more definite statement, and therefore the motion to dismiss should be denied on that basis. However, plaintiff acknowledges that 15 USCS § 78u-6(h) was not cited as a specific statutory basis for her retaliation/Dodd-Frank claims, and to the extent the Court deems it appropriate that this citation be express, plaintiff respectfully requests leave to amend.

[8] Again, to the extent plaintiff's complaint does not expressly allege post-termination conduct as part of defendant's retaliation, plaintiff respectfully requests the opportunity to amend her complaint accordingly.

Accordingly, plaintiff's retaliation claims under Dodd-Frank are viable, and defendant's motion to dismiss the second claim should be denied.

4. Conclusion. Based on the foregoing, plaintiff respectfully requests that (1) defendant's motion to compel arbitration be denied in its entirety, and (2) that defendant's motion to dismiss the second cause of action be denied; or, alternatively, that leave to amend be granted as to that claim..

August 20, 2012 ROSS & MORRISON

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